

NOVA SCOTIA COURT OF APPEAL
Cite as: **R. v. T.W.W.** , 1996 NSCA 159

Clarke, C.J.N.S.; Hart and Matthews, JJ.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

- and -

T.W.W., (a young person)

Respondent

) Robert E. Lutes, Q.C.
) for the Appellant

) Robert D. Chipman
) for the Respondent

) Appeal Heard:
) May 21, 1996

) Judgment Delivered:
) May 21, 1996

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

THE COURT: Appeal allowed varying disposition of the judge of the Youth Court by extending the term of custody of the appellant, a young person, and extending the period of probation and adding conditions to the probation order, per oral reasons for judgment of Clarke, C.J.N.S.; Hart and Matthews, JJ.A. concurring.

The reasons for judgment of the Court were delivered orally by:

CLARKE, C.J.N.S.:

The Crown seeks leave and, if granted, appeals the disposition imposed on T.W.W., a young person, by a judge of the Youth Court.

T.W.W., then 15 years old, was charged with nine offences. Upon pleading guilty to seven the Crown withdrew an under age liquor offence and a violation for failure to comply with a probation order.

Three of the seven to which he pled guilty were offences contrary to the **Criminal Code of Canada**, R.S.C. 1985, c. C-46 being s. 430(4)(b) (damage to property) and s. 372(3) (harassment by telephone) and a s. 26 breach of the **Young Offenders Act**, R.S.C. 1985, c. Y-1 by a failure to comply with the conditions of a probation order. These related to Mr. J.. T.W.W. first threw a rock through one of his windows and followed that by throwing eggs on his property and, finally, by harassing telephone calls.

T.W.W. pled guilty to three offences which related to Mr. F., one of his school teachers. After making a home-made bomb (**Code** s. 81(1)(c)) he planted it in Mr. F.'s car about 10:30 o'clock at night. It exploded and caused about \$1,600 property damage to the car (**Code** s. 430(4)(b)). Earlier he telephoned Mr. F. using profane language and warned him that he had better watch out.

After obtaining a search warrant the police found shotgun shells, broken pieces of shotgun pellets and the like at T.W.W.'s house resulting in the seventh charge to which he pled guilty being the indictable offence of possession of an explosive substance contrary to s. 82 of the **Criminal Code**.

The Crown asked the Youth Court to impose a custodial disposition in the range of 18 months to two years. Defence counsel urged a custodial disposition in the lower range of that suggested by the Crown. He described the offences as victimless crimes, that T.W.W. needed an opportunity to salvage his life and a chance to go back to school. T.W.W. said he was sorry and remorseful.

The judge at the Youth Court imposed a period of open custody at the Shelburne Youth Centre beginning December 14, 1995 and ending May 1, 1996 for his s. 81(1)(c) offence (home-made bomb) and for the other six offences probation of 12 months to be concurrently applied from his release from custody. The only terms of the probation order were that T.W.W. was to keep the peace and be of good behaviour.

On appeal the Crown contends the disposition inadequately reflects the element of deterrence and the nature of the offences and circumstances of the young person.

Counsel for T.W.W. submits the judge of the Youth Court was in the best position to assess the evidence and by his disposition he adequately considered the question of deterrence and rehabilitation.

A review of the remarks made by the judge of the Youth Court at the time of the disposition hearing reveals that he concentrated on the seriousness of the bomb offence, the harassment caused by the telephone calls and the need, by way of rehabilitation, of returning T.W.W. to school.

Serious deficiencies, in our view, were the failure of the judge to consider the aggravating evidence before the court that related to T.W.W.'s lengthy Youth Court record, his several breaches of probation and his disregard and disrespect for the efforts made by the court, probation officers and family members to assist him to improve his attitude toward life and those around him.

From January 30, 1994 to July 11, 1995, he was charged and convicted of 16 offences including seven for theft, three for breach of probation and one offence under the **Protection of Property Act**. He was under probation when the present offences were committed. The evidence before the Youth Court, including the pre-disposition reports of the probation officers were convincing that T.W.W. had no respect for law and order or those who were patiently trying to turn his life around to more productive and worthwhile pursuits. In the circumstances his professions of regret and remorse seem hollow.

T.W.W. was in a very real way out of control and devoting his life to a pattern of deviant behaviour.

Counsel have provided the Court with letters from Correctional Services indicating that a plan is in place for the continuation of T.W.W.'s public school education.

This Court continues to be disinclined to return a person to custody (**R. v. Bartkow** (1978), 24 N.S.R. (2d) 518 (N.S.S.C.A.D.)). We are mindful that it is not for this Court to usurp the function of the judge of the Youth Court and impose a disposition that we would have imposed had we been the judge of first instance (**R. v. Shropshire** (1995), 102 C.C.C. (3d) 193, S.C.C.). However, it is our function to intervene when the disposition, as here, is so excessively lenient as to be unfit.

We grant leave to appeal. In granting the appeal we recognize the need to once more try to rehabilitate T.W.W. by making it possible for him to return to school at the beginning of the next academic year.

Accordingly we allow the appeal and we vary the disposition of the Youth Court by extending his term of open custody at the Shelburne Youth Facility to August 13, 1996 for his violation of s. 81(1)(c) of the **Criminal Code**. We order that the probation order put in place by the judge of the Youth Court will continue to apply, concurrently to all the other six offences, for 16 months from the original release of T.W.W. from custody in the case of the indictable offences and six months in the case of the summary conviction offences which probationary period shall be inclusive for all offences. We further order that the conditions of his probation order be varied by adding thereto the following,

- (c) Remain within Nova Scotia unless written authorization is obtained from the probation officer;
- (e) Attend school;
- (h) Abstain from the consumption, use or possession of alcoholic beverages and, except when legally prescribed by a physician, narcotics and drugs as defined in the Narcotic Control Act and the Food and Drug Act;

- (i) Refrain from initiating contact or attempting to contact, at any time for any reason, whether directly or indirectly R. J. and his family and P. F. and his family;
- (j) Unless written authorization is obtained from the probation officer to be elsewhere, be in the place of residence by 9:00 o'clock in the evening, Sunday to Thursday, and by 10:00 o'clock Friday and Saturday evenings and remain there until 6:30 o'clock each following morning;
- (k) Attend for such alcohol or drug abuse assessment and counselling as directed by the probation officer;
- (l) Attend for mental health assessment and counselling as directed by the probation officer;

We further order that the warrant of committal dated December 14, 1995 be amended as herein provided.

C.J.N.S.

Concurred in:

Hart, J.A.

Matthews, J.A.